

**Wan Khairani binti Wan Mahmood v
Ismail bin Mohamad & Anor**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-853
OF 2002
ZULKEFLI, RAUS SHARIFF AND HELILIAH JJCA
7 SEPTEMBER 2007

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Civil Procedure — Injunction — Application for — Injunction to preserve status quo and to prevent dissipation of monies — Whether damages an adequate remedy a relevant consideration

C

Companies and Corporations — Derivative action — Minority shareholder and director — Action against majority shareholder — Injunction sought to restrain majority shareholder from dissipating monies in account — Whether injunction ought to be framed in terms reflecting minority shareholding

D

Constitutional Law — Courts — Jurisdiction — Syariah Court — Action commenced in Syariah court for 'harta sepencarian' — Such action involving certain property and compensation monies — Derivative action filed in civil court involving law of trusts and company law in relation to same property and compensation monies — Whether jurisdiction of civil courts ousted — Whether civil action an abuse of process for reason of duplicity — Whether matter one of conflicting jurisdictions or overlapping jurisdictions — Whether civil courts should play role in avoiding possible conflicts with Syariah courts — Federal Constitution art 121(1A)

E

F

Islamic Law — Divorce — Mutaah and harta sepencarian — Application for harta sepencarian after divorce — Claim for harta sepencarian involving assets subject to litigation in civil court — Whether action in civil court an abuse of court's process for reason of duplicity — Whether jurisdiction of civil court ousted — Federal Constitution art 121(1A)

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H

Islamic Law — Jurisdiction — Syariah Court — Overlapping jurisdictions between Syariah court and civil court — Whether jurisdiction of civil court ousted — Whether civil court may proceed to try action — Federal Constitution art 121(1A)

I

Islamic Law — Jurisdiction — Syariah Court — Matter in Syariah Court also involving secular law — Whether jurisdiction of civil courts ousted — Federal Constitution art 121(1A)

- A The appellant and the first respondent were divorced in 1990. In 1992 the appellant commenced an action in the Syariah Court for ‘harta sepencarian’ orders (‘the Syariah action’). The appellant and the first respondent were both directors and shareholders in the second respondent. The first respondent was the majority shareholder whereas the appellant was the minority shareholder.
- B The appellant alleged that the first respondent was the trustee under a written trust deed dated 21 January 1986 in respect of some land (‘the lands’) registered in the name of the trustee and held in trust for the second respondent. The purchase price for the lands was paid for by the second respondent. The government subsequently acquired these lands and compensation monies were paid to the first respondent in 1997 and 1999. The first respondent deposited the said monies with AmFinance Bhd. On 16 February 2001, the appellant added the lands as assets to her Syariah action. On 30 September 2002, the appellant filed a civil derivative action in the High Court to inter alia declare the first respondent a trustee for the compensation monies received and to compel the first respondent to pay these monies to the second respondent. She then sought and obtained an ex parte injunction to restrain the first respondent from using and/or utilising the compensation monies. However, upon a inter parties hearing of the application for confirmation of the injunction, the application was dismissed and the appellant thus appealed to the Court of Appeal. In opposing the appeal, counsel for the respondent submitted: (i) that since the appellant had already commenced the Syariah action wherein the lands constituted part of the action, the civil action was duplicitous and therefore an abuse of process; (ii) the Court of Appeal lacked jurisdiction by virtue of art 121(1A) of the Federal Constitution; and (iii) the appellant should be denied equitable relief as she had not come with clean hands.
- F
- G **Held**, allowing the appeal:
- H (1) The Federal Court’s judgment in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 4 MLJ 585 had further affirmed the judicial approach to be applied when the question of the scope of jurisdiction of the Syariah court and the civil court became an issue. This decision had not only considered but had also reviewed several past decisions on the question of the scope of jurisdiction of the Syariah court (see para 16).
- I (2) The term ‘harta sepencarian’ is defined under s 2 of the Islamic Family Law (Federal Territories) Act 1984 (or Act 1984), to mean property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syariah. ‘Harta sepencarian’ is a subject matter within the jurisdiction of the Syariah High Court (see para 19).

- (3) Item 1 of the State List of the Ninth Schedule to the Federal Constitution and item 4(e) of List I (Federal List) of the Ninth Schedule to the Federal Constitution indicate that the Syariah court is capable of being vested with jurisdiction in the subject matters of equity and trusts. However, it appears that the law relating to companies remains within the corpus juris of secular law (see paras 32–33). A B
- (4) If cl 121(1A) of the Federal Constitution has as an object, overcoming conflict between the Syariah courts and the civil courts, then the civil courts should have the role of assisting in avoiding the conflict (see para 36). C
- (5) In the instant case, even if the land had changed form into compensation monies, and claimed in the first instance as harta sepencarian, this was not in essence a matter of conflicting jurisdiction but one of a possible overlapping claim. The matters raised in the appellant's application for injunction were not just confined to matters relating to trusts but also related to the law relating to companies (see paras 38 & 41). D
- (6) In the instant appeal, the court was not concerned with conflicting provisions in the same legislation but rather interpretation on the question of jurisdiction. The ascertainment of the precise status of the subject lands before they changed form into a monetary compensation was the issue before the civil court. The determination of the question relating to the transactions alleged to be undertaken by two companies was capable of assisting rather than negating the jurisdiction of the Syariah court for purposes of apportioning the harta sepencarian. It could not be seen how the efficacy of the jurisdiction of the Syariah court would be impaired or prejudiced by a civil court determining whether there were indeed transactions undertaken by a company in respect of which both the appellants and respondents were directors (see para 46). E F G
- (7) This was not strictly a matter concerning the practise of faith in Islam but one of matters relating to the activities of companies where the persons involved professed the religion of Islam. The core of the appellant's claim remained within the sphere of secular law. The first two objections to jurisdiction were therefore not upheld. The Court of Appeal was able to exercise its jurisdiction without violating the object of art 121(1A) Federal Constitution (see para 46). H
- (8) Although it was alleged that the appellant had engaged in misleading conduct, the explanation provided by the appellant was found to be plausible (see paras 47 & 49). I
- (9) In the present appeal the appellant sought to maintain a status quo, to prevent compensation monies standing in the account of the first

- A respondent from being used up, transferred or even dissipated. This was not strictly a question of seeking damages but a restitution of the assets alleged to be rightly standing to the credit of the second respondent instead. The question whether damages would be a more adequate remedy was irrelevant (see para 50).
- B (10) However, if the court were to grant the injunction on the terms as prayed for, it would be too wide as the first respondent was a director and majority shareholder of the second respondent. Therefore, the first respondent should be enjoined *inter alia* from utilizing or transferring
- C or withdrawing sums up to an amount equivalent to the appellant's minority shareholding (see para 53).

[Bahasa Malaysia summary]

- D Perayu dan responden pertama telah bercerai pada tahun 1990. Pada tahun 1992 perayu telah memulakan satu tindakan di Mahkamah Syariah untuk perintah-perintah harta sepencarian ('tindakan Syariah'). Perayu dan responden pertama kedua-duanya pengarah-pengarah dan
- E pemegang-pemegang saham dalam responden kedua. Responden pertama merupakan pemegang saham majoriti manakala perayu merupakan pemegang saham minoriti. Perayu mengatakan bahawa responden pertama adalah pemegang amanah di bawah satu surat ikatan amanah bertarikh 21 Januari 1986 berkaitan beberapa bidang tanah ('tanah tersebut') yang
- F telah didaftarkan dalam nama pemegang amanah dan dipegang dalam amanah untuk responden kedua. Harga belian untuk tanah tersebut telah dibayar oleh responden kedua. Kerajaan kemudiannya telah memperoleh tanah tersebut dan wang pampasan telah dibayar kepada responden pertama pada tahun 1997 dan 1999. Responden pertama telah menandatangani wang tersebut dengan AmFinance Bhd. Pada 16 Februari 2001, perayu telah menambah tanah tersebut sebagai aset dalam tindakan Syariahnya. Pada 30 September 2002, perayu telah memfailkan satu tindakan terbitan sivil di Mahkamah Tinggi untuk antara lain mengisytiharkan responden pertama sebagai pemegang amanah untuk wang pampasan yang diterima dan untuk mendesak responden pertama membayar wang tersebut kepada responden kedua. Namun, setelah perbicaraan *inter partes* untuk permohonan pengesahan injunksi, permohonan tersebut telah ditolak dan perayu telah merayu ke Mahkamah Rayuan. Dalam menentang rayuan tersebut, peguam bagi pihak responden berhujah: (i) bahawa memandangkan perayu telahpun memulakan tindakan Syariah di mana tanah tersebut membentuk sebahagian daripada tindakan itu, tindakan sivil tersebut bersifat duplikasi dan merupakan satu penyalahgunaan proses; (ii) Mahkamah Rayuan tidak mempunyai bidang kuasa menurut perkara 121(1A)

Perlembagaan Persekutuan; dan (iii) perayu sepatutnya dinafikan relief berbentuk ekuiti kerana beliau datang dengan tangan kotor. A

Diputuskan, membenarkan rayuan tersebut: B

- (1) Penghakiman Mahkamah Persekutuan dalam *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 4 MLJ 585 telah mengesahkan pendekatan kehakiman yang patut digunakan apabila persoalan tentang skop bidang kuasa mahkamah Syariah dan mahkamah sivil menjadi satu isu. Keputusan ini bukan sahaja mengambilkira tetapi juga meneliti beberapa keputusan lampau berhubung persoalan tentang skop bidang kuasa mahkamah Syariah (lihat perenggan 16). C
- (2) Istilah 'harta sepencarian' ditafsirkan di bawah s 2 Akta Undang-Undang Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984 (atau Akta 1984), untuk bermaksud hartanah yang diperoleh bersama oleh suami dan isteri semasa perkahwinan wujud menurut syarat-syarat yang ditetapkan oleh Hukum Syariah. 'Harta sepencarian' adalah satu perkara pokok dalam bidang kuasa Mahkamah Tinggi Syariah (lihat perenggan 19). D E
- (3) Item 1 kepada Senarai Kerajaan Negeri dalam Jadual Kesembilan Perlembagaan Persekutuan dan item 4(e) kepada Senarai I (Senarai Persekutuan) dalam Jadual Kesembilan Perlembagaan Persekutuan menunjukkan bahawa mahkamah Syariah boleh diberikan bidang kuasa dalam perkara pokok berhubung ekuiti dan amanah. Namun, ia kelihatan seperti undang-undang berkaitan syarikat-syarikat masih dalam corpus juris undang-undang sekular (lihat perenggan 32–33). F
- (4) Jika kl 121(1A) Perlembagaan Persekutuan mempunyai suatu objek, mengatasi konflik antara mahkamah-mahkamah Syariah dan sivil, maka mahkamah-mahkamah sivil sepatutnya mempunyai peranan dalam membantu untuk mengelakkan konflik itu (lihat perenggan 36). G
- (5) Dalam kes semasa, jikapun tanah tersebut telah bertukar bentuk menjadi wang pampasan, dan dituntut pada awalnya sebagai harta sepencarian, ini bukan inti pati suatu perkara yang mempunyai konflik bidang kuasa tetapi suatu kemungkinan tuntutan yang bertindan. Perkara-perkara yang ditimbulkan dalam permohonan pemohon untuk injunksi tidak hanya terbatas kepada perkara-perkara berkaitan amanah tetapi juga tentang undang-undang berkaitan syarikat-syarikat (lihat perenggan 38 & 41). H I
- (6) Dalam rayuan ini, mahkamah tidak khuatir tentang peruntukan yang bercanggah dalam perundangan sama tetapi tentang pentafsiran berhubung persoalan bidang kuasa. Penentuan status yang tepat

- A berhubung tanah yang dipersoalkan sebelum ianya bertukar kepada wang pampasan merupakan persoalan di hadapan mahkamah sivil. Penentuan tentang persoalan berkaitan transaksi-transaksi yang dikatakan telah dijalankan oleh dua syarikat boleh membantu daripada menafikan bidang kuasa mahkamah Syariah bagi tujuan pembahagian
- B harta sepencarian. Ia tidak dilihat bagaimana keberkesanan bidang kuasa mahkamah Syariah boleh menjadi kurang atau diprejudiskan oleh mahkamah sivil dalam menentukan sama ada terdapat transaksi-transaksi yang telah dijalankan oleh sebuah syarikat yang mana kedua-dua perayu dan responden-responden adalah
- C pengarah-pengarahnya (lihat perenggan 46).
- (7) Ini bukan merupakan satu perkara yang hanya berkaitan amalan agama Islam tetapi salah satu perkara berhubung aktiviti-aktiviti syarikat di mana mereka yang terlibat adalah beragama Islam. Teras tuntutan perayu masih dalam skop undang-undang sekular. Dua bantahan
- D pertama terhadap bidang kuasa tersebut oleh itu tidak dikekalkan. Mahkamah Rayuan boleh menggunakan bidang kuasanya tanpa menentang objek perkara 121(1A) Perlembagaan Persekutuan (lihat perenggan 46).
- E (8) Meskipun ia dikatakan bahawa perayu terlibat dalam perbuatan yang mengelirukan, penjelasan yang diberikan oleh perayu didapati munasabah (lihat perenggan 47 & 49).
- (9) Dalam rayuan ini perayu memohon untuk dikekalkan status quo, untuk mengelakkan wang pampasan yang berada dalam akaun
- F responden pertama digunakan keseluruhannya, dipindahkan ataupun dilesapkan. Ia bukan hanya satu persoalan memohon ganti rugi tetapi satu pemulangan aset-aset yang dikatakan dengan sah berada dalam kredit responden kedua sebaliknya. Persoalan sama ada ganti rugi
- G merupakan satu remedi yang lebih mencukupi adalah tidak relevan (lihat perenggan 50).
- (10) Bagaimanapun, sekiranya mahkamah memberikan injunksi berdasarkan terma seperti yang dipohon, ia terlalu luas kerana responden pertama adalah pengarah dan pemegang saham majoriti
- H responden kedua. Oleh itu, responden pertama sepatutnya dihalang antara lain daripada menggunakan atau memindahkan atau mengeluarkan jumlah setakat suatu jumlah yang bersamaan dengan pemegangan saham minoriti perayu (lihat perenggan 53).]

I Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2866–2888.

For cases on jurisdiction, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1927–1944.

For cases on minority shareholder and director, derivative action generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 135–151. **A**

For cases on mutaah and harta sepencarian, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 517–518.

For cases on Syariah Court's jurisdiction, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 561–589. **B**

Cases referred to

Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor [2004] 2 MLJ 529 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd) **C**

Harshad S Mehta & Ors v State of Maharashtra 2001 8 SCC 257 (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd) **D**

Soon Singh all Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 s 46(2) **E**

Courts of Judicature Act 1964 s 25(2)

Federal Constitution art 121(1A)

Islamic Family Law (Federal Territories) Act 1984 ss 2, 58

Syariah Court Civil Procedure (Federal Territories) Act 1998 ss 199,200 **F**

Appeal from: Writ of Summons No S4–22–1143 of 2002 (High Court, Kuala Lumpur)

Sulaiman bin Abdullah (PY Chong with him) (Nordin Torji & Partners) for the appellant. **G**

Dato' Dr Cyrus Dass (Abdul Rashid bin Ismail, Megat Abdul Munir dan Abdul Muiz Samuri with him) (Khalek Awang & Associates) for the respondents.

Heliliah JCA (delivering judgment of the court):

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[1] This was an appeal against the decision of the learned High Court judge in dismissing an application by the appellant/plaintiff at the inter

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- A parties stage, for an injunction. The appeal has been allowed and the reasons are stated herein

THE BACKGROUND

- B [2] Before embarking on the reasons it is necessary to outline the facts leading to the appeal as there was an objection raised by the respondent/defendant that the appellant/plaintiff was also maintaining in the Syariah Court of the Federal Territory of Kuala Lumpur an action for harta sepencarian orders ('the Syariah action') in respect of certain land identified in grant 27446 Lot No 3777 also citing the first respondent in this appeal as the defendant.

- D [3] The Syariah action for harta sepencarian orders commenced on 15 October 1992 following the divorce of the appellant and respondent on 2 May 1990. It was disclosed that on 16 October 2001 the appellant had also added on to the harta sepencarian claim another piece of land identified under grant 31445 Lot No 5539. Both these lands that is land held under grant 27446 Lot 3777 and grant 31445 placeLot 5539 may be referred to as the 'subject lands'.

- E [4] On 30 September 2002 while the Syariah action was still pending, the appellant filed a civil suit seeking a declaration. It is relevant to describe the background for the appellant's civil suit in order to deal with the issues in the appeal.

- G [5] The first respondent and one Mohamed bin Mustapha were at all material times directors in a company called Sri Alam Sdn. Bhd. ('Sri Alam company'). At the material time the appellant and first respondent are directors and shareholder of a company called Rasa Rata Sdn Bhd ('Rasa Rata company'). Apparently on 30 December 1994 the Sri Alam company obtained an order dated 5 January 1995 ('the 1995 Order') whereby the first respondent was declared as trustee of the abovementioned subject lands for the Sri Alam company. It has been the allegation of the appellant that the first respondent and the said Mohamed 'deliberately deceived' and misled the court in granting the 1995 Order as follows that is:

- H (a) Sri Alam company had by an agreement in writing dated 4 September 1975 purchased the subject lands;
- I (b) by a deed of assignment dated 9 September 1977, Sri Alam company assigned all its rights in and under the aforesaid agreement to the first respondent;

- (c) the first respondent completed the purchase of the said lands and caused the said lands to be registered in his name as proprietor. A

[6] The appellant has averred that the above mentioned deception was advanced on the basis of the knowledge of the first respondent and Mohamed bin Mustapha that the subject lands were to be acquired by the relevant state authority. B

[7] It was further averred that the deception was also engineered when it was alleged to be known by the first respondent that the purchase price for the said lands were in fact paid by the Rasa Rata company by virtue of a trust deed executed on 21 January 1986 by the first respondent and Rasa Rata company in the presence of the aforementioned Mohamed bin Mustapha. C

[8] The subject lands were then stated to have been compulsorily acquired by the state authority resulting in cheques No 035276 dated 10 October 1997 for the amount RM4,236,341 and No 098289 dated 8 January 1999 for RM115,299,685 totalling RM119,536,026 both being drawn on Bank Bumiputra Malaysia with the first respondent being the recipient as compensation for the acquisition which was alleged to be maintained at Am Finance Bhd. D
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[9] It is the contention of the appellant that the first respondent is retaining the compensation in his personal account without transferring the same to the account of the Sri Alam or Rasa Rata company. F

[10] On 30 September 2002 the appellant filed an action S22-1143-2002 against the first and second defendants (now the first and second respondents respectively). G

THE MAIN ACTION FILED

[11] The appellant in a statement of claim which was amended on 3 October 2002 claimed: H

- (a) a declaratory order that the first defendant (first respondent) is a trustee for all the compensation monies received and yet to be received for the acquisition of lands held under Grant 27446 Lot No 3777 and Grant 31445 Lot No 5539 (namely the subject lands).
(b) an order that the sum of RM119,536,026 be paid to the second defendant (second respondent) forthwith. In the statement of claim the appellant had stated that she had brought the action for and on behalf of the second respondent by way of a derivative action for the benefit of the second defendant/respondent, being at all material times a I

- A director and minority shareholder of the second defendant and being the registered and beneficial owner of 512,000 ordinary shares of RM1 per share equivalent to 7.97% in the capital of the second defendant/respondent. The statement of claim also identified the first defendant/respondent as a director and majority shareholder of the
- B second defendant being the registered and beneficial owner of 5,909,039 ordinary shares of RM1 per share equivalent to 92.03% in the capital of the second defendant/respondent.

ENCLOSURE 4 (APPLICATION FOR INJUNCTION)

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- [12] Pursuant to the aforementioned main action the appellant then filed an application for an injunction (encl 4) and obtained an *ex parte* order for an injunction dated 23 October 2002 in the following terms, inter alia;
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- [13] The first respondent be restrained from utilizing or transferring or withdrawing the sums received by the first respondent vide cheques no. 035276 dated 10 October 1997 for RM4,236,341 and no 098289 dated 8 January 1999 for RM115,299,685.00 totalling RM119,536,026 both
- E drawn on Bank Bumiputra Malaysia Bhd. as compensation for the compulsory acquisition of the lands held under Grant 27446 Lot 3777 and Grant 31445 Lot 5539 or any part thereof deposited by the first respondent with AmFinance or any financial institution inclusive of accrued interest thereon and be further restrained from using any payments of compensation
- F from the relevant authorities in respect of the aforesaid lands for any other purposes than for the benefit of the second respondent. There are several other terms of the order which it is found unnecessary to mention for the purposes of this appeal.
- G
- [14] Subsequently however upon the hearing *inter parties* of the application for the confirmation of the injunction that application was dismissed by an order dated 18 November 2002. The present appeal arose from that order that is 18 November 2002 order.

H THE APPEAL

- [15] Three issues have been raised by learned counsel for the respondents in opposing the appeal as follows:
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- (1) the appellant has already lodged a claim in the Syariah court where the subject lands also constitute part of her claim and by instituting the civil claim there is therefore an abuse of process by duplicity of proceedings;
 - (2) by virtue of the provisions of art 121(1A) of the Federal Constitution ('FC') it was averred that the Court of Appeal was lacking in

jurisdiction since the appellant has claimed the subject lands as harta sepencarian in the Syariah court and the claim is still pending before the said court;

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- (3) the appellant should be denied the equitable injunctive relief on account of alleged misleading averments made throughout the proceeding that is she has not come with clean hands.

B

[16] The first two issues are interwoven. The issue on the application of the art 121(1) of the FC has arisen once again in this case in the context of the scope of jurisdiction of the Syariah court and civil court. At the time of writing the grounds of the judgment in this appeal the Federal Court on 1 June 2007 had delivered a judgment in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain*. [2007] 4 MLJ 585. This case has to be referred to specifically for the reason that it has further affirmed the judicial approach to be applied when the question of the scope of jurisdiction of the Syariah court and the civil court becomes an issue. This most recent decision has not only considered but also reviewed several past decisions on the question of the scope of jurisdiction of the Syariah court. This court is also mindful to observe that the decisions considered in the *Lina Joy* case, pertain to the issue of the practise and propagation of the religion of Islam. I would also give attention to the fact that the majority judgment in the Federal Court in the *Lina Joy's* case had also given affirmation to the case of *Soon Singh all Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489. *Soon Singh's* case had indicated that even when no express provisions conferred jurisdiction on the matter of apostasy in a Kedah Enactment nevertheless the Syariah court would be vested with the same by necessary implication.

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[17] The learned counsel for the respondents has specifically contended that the appellant had lodged a claim on the basis of the subject lands being harta sepencarian in the Syariah High Court. In the instant appeal the relevant legislation to be considered is the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 1993').

G

[18] Section 46(2) of Act 1993 which stipulates the jurisdiction of the Syariah High Court, including its civil jurisdiction, states inter alia;

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(2) A Syariah High Court shall —

- (b) in its civil jurisdiction hear and determine all actions and proceedings in which all the parties are Muslim and which relate to —

I

- (i) ...

- A (ii) ...
(iii) ...
(iv) the division of, or claims to harta sepencarian.
- B [19] The term 'harta sepencarian' is not defined in the Act 1993 but is be found instead in the Islamic Family Law (Federal Territories) Act 1984 ('the Act 1984'). In this Act s 2 specifies, inter alia, that 'harta sepencarian'
- C of marriage in accordance with the conditions stipulated by Hukum Syariah. It is therefore expressly provided that harta sepencarian is a subject matter within the jurisdiction of the Syariah High Court. Learned counsel for the first respondent in citing the above mentioned provision has also referred to art 121(A) of the FC, in force since 10 June 1988. It is appropriate in dealing
- D with this contention to encapsulate the contention of the learned counsel for the respondent with regard to the consequential lack of jurisdiction of the civil court which are as follows:
- E (1) by s 58 of the Act 1984 the Syariah court is empowered to make orders of division of harta sepencarian. The shoulder heading of s 58 itself provide 'Power of Court' to order division of harta sepencarian.
- F (2) ss 199 and 200 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 [or SCCP (Federal Territories) Act 1998]. Section 199 (1) of the SCCP (Federal Territories) Act 1998 provides that the Syariah court may make an order, inter alia, for the preservation of property. Section 200 of the same Act provides that the Syariah court may grant an injunction.
- G (3) The above mentioned jurisdictional powers of the Syariah court have already been invoked by the appellant and that since both the parties in this proceedings are Muslims it followed therefore that art 121(1A) of the FC would preclude the determination of the claim of appellant by *any court other than the Syariah court.*
- H [20] The underlying emphasis is that the determination of the jurisdiction of the Syariah court is undertaken by the 'subject matter' approach and not the 'remedy approach'. Learned counsel for the respondents in support of the submission had cited the Federal Court decisions in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zolkaffly bin Shaik Natar & Ors* [2003] 3 MLJ 705 and *Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor* [2004] 2 MLJ 529.
- I [21] A perusal of the abovementioned decisions reveal that the decisions were indeed premised on the very fact that in both instances while the remedy

sought, that is, one for the declaratory relief and the other a notice of motion for a writ of habeas corpus, the Syariah court in both instances have, by virtue of specific legislation, been expressly conferred with the subject matter of the claims instituted by the parties.

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[22] In the *Majlis Ugama Islam Pulau Pinang dan Seberang Perai* case, Haidar FCJ (as he then was) in delivering the decision of the Federal Court had also referred to the earlier Supreme Court decision in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793. Certain passages in the *Faridah bte Dato Talib* case which were referred to are reproduced here for the purpose of eliciting the approach to be taken when the challenge is mounted on the question of an alleged conflict of jurisdiction. Harun Hashim SCJ (as he then was) in *Faridah bte Dato Talib*'s case expressed, inter alia (at p 803):

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Taking an objective view of the constitution, it is obvious from the very beginning that the masters of the constitution clearly intended that the Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the constitution. Item 1 of the state list provides;

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Muslim Law and personel and family law of persons professing the Muslim religion ... the constitution, organization and procedure of Muslim Courts the determination of matters of Muslim Law and doctrine and Malay custom.

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Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th Century such law have been administered not only by the Syariah courts but also by the civil courts. What art 121(1A) has done is to grant exclusive jurisdiction to the Syariah courts in the administration of such Islamic Laws. *In other words, art 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the syariah courts.*

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(Emphasis added.)

[23] In the case of *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1 Hashim Yeop A Sani CJ (Malaya) (as he then was) observed inter alia (at p 7):

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... The new clause 1A of 121 of the constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah courts. *But that clause does not take away the jurisdiction of the civil courts to interpret any written law of the states enacted for the administration of Muslim.*

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(Emphasis added.)

- A [24] The abovementioned judicial statements are referred to as both decisions clarify that (i) the purport of art 121 cl (1A) is to prevent conflicting jurisdiction and (ii) civil courts are not precluded from interpreting the written law in question.
- B [25] In this appeal learned counsel for the respondents has also mounted a challenge to the jurisdiction of the civil court on the issue of abuse of process. It has been contended that since the appellant has in fact permitted the Syariah High Court to take cognizance of her claim to the subject lands on the basis that it is part of harta sepencarian it is tantamount to an abuse of process for the civil court to also assume jurisdiction. The High Court judge had in fact determined in this case that the injunction relief claimed should not be entertained since there was a claim already lodged before the Syariah court.
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- D [26] In *Faridah bt Dato Talib's* case, the issue of abuse of process was also countenanced in the judgment of Mohamed Azmi SCJ (as he then was as follows at p 807:
- E ... Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* at p 536 had this to say:
- F My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.
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- H Applying the above principle, it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter.
- I [27] In the light of the abovementioned matters, it is necessary to consider whether the exercise of jurisdiction to entertain the appellant's appeal in the claim for an injunctive relief would lead to an undesirable situation of conflicting jurisdiction and in the course of it cause a duplicity of proceedings which could be an instance of abuse of process.
- [28] Before considering the statement of claim of the appellant in pursuance of which a claim is made for the injunctive relief, it is found

incumbent once again to revisit the judgment of the Federal Court in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai*. For reasons of clarity and in order to highlight the salient aspect on the question of the jurisdiction of the Syariah court of the judgment it is found necessary to reproduce certain parts of the judgment *verbatim* as the Federal Court in that case had also dealt with what could be termed as the *wider approach to jurisdiction*. The relevant part of the judgment is restated thus (per Haidar FCJ):

Harun Hashim SCJ, in *Mohamed Habibullah* was of the opinion, that when there was a challenge to jurisdiction, the correct approach was to firstly see whether the Syariah court has jurisdiction and not whether the state legislature has power to enact law conferring jurisdiction on the Syariah court.

In *Soon Singh*, the Federal Court is of the view that even if there is no express provision in the State Enactment conferring jurisdiction on the Syariah court, the Federal Court took the 'implication approach' in considering the issue of jurisdiction. Mohamed Dzaiddin, FJC (as he then was) stated at p 22 in *Soon Singh* thus:

It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and the organization of the Syariah courts and related matters. Therefore, when jurisdiction is expressly conferred on Syariah courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah courts.

We respectfully agree with this approach. *But what happens in a situation where there is no expression provision at all in the State Enactment giving jurisdiction to the Syariah court on any particular subject matter but the subject matter is within the competence of the state legislature to enact, that is to say, in particular para 1 of the Second List (State List) in the Ninth Schedule to the Constitution under the caption 'Legislative Lists'?*

In *Soon Singh* there is an express provision on the conversion to Islam but not on renunciation of Islam and hence the implication approach. The answer, in our view, is provided by Abdul Kadir Sulaiman J (as he then was) in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681. Though, in *Md Hakim Lee* the learned judge took a wider approach in interpreting the issue of jurisdiction, by reference to para 1 of the Second List called the State List read with art 74 of the Constitution when the issue of art 121(1A) of the Constitution before his Lordship was in respect of the Administration of Islamic Law (Federal Territories) Act 1993 (a federal legislation), the wider approach taken by His lordship equally applied to the Penang Enactment. In this respect, we quote the relevant passage of the judgment of his Lordship in *Md Hakim Lee* (at pp 425–429):

In *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231, my learned brother held the view to the contrary. He held that the Syariah court is not a creature of syariah law (hukum syarak). It owes its existence

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A to the written laws of Parliament and state legislatures. As such, it is his view that
in order to ascertain the question of jurisdiction of the Syariah court, *it is*
B *incumbent that reference be made to these laws and see whether jurisdiction over the*
particular matter is given to the Syariah court or the civil court. While it is true that
the constitution, organization and procedure of the Syariah court is to be so
provided by the respective state legislature as so stated in para 1 of the State List
read with art 74 of the Federal Constitution, the issue at hand is not one of the
constitution, organization and procedure of the Syariah court. *The issue is a*
C *substantive one which a Syariah court, having jurisdiction only over persons*
professing the religion of Islam and in respect only of any of the matters included in
para 1 of the State List, has the power to adjudicate, and as pointed out earlier, the
D *prayers sought in the application is one touching on the personal law of persons*
professing the religion of Islam. Therefore, with respect, it cannot be true to say
that in order to ascertain the question of jurisdiction of the Syariah court,
reference be made only to the respective laws enacted by the state legislature to
see whether jurisdiction over the particular matter is given to the Syariah Courts
or the Civil Courts provided in art 121(1) of the Constitution. *To see the*
E *jurisdiction of the Syariah court, List II of the Ninth Schedule to the Federal*
Constitution should not be interpreted so narrowly in the light of the overall
jurisdiction given by the Constitution in List II that the Syariah court shall have
jurisdiction over persons professing the religion of Islam in respect of matters stated
therein. In *Mohamed Habibullah's* case, Harun Hashim SCJ at p 268 said:

It is obvious that the intention of Parliament by art 121(1A) is to take away
the jurisdiction of the High Courts in respect of any matter within the
jurisdiction of the Syariah court: *Dalip Kaur v Pegawai Polis Daerah, Balai*
F *Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the
opinion that when there is a challenge to jurisdiction, as here, the correct
approach is to firstly see whether the Syariah court has jurisdiction and not
whether the state legislature has power to enact the law conferring jurisdiction
on the Syariah court. The validity of a state law can only be questioned in a
separate proceeding under art 4(3) of the Federal Constitution ... And by art
G 4(4) read with art 128, only the Supreme Court may declare any such law
invalid in the proceedings referred to in art 4(3).

(Emphasis added.)

H *The jurisdiction of the Syariah courts given by the Act, in the light of the provisions*
provided by para 1 of List II mentioned earlier, cannot in any way limit the wider
jurisdiction of the courts to deal over persons professing the religion of Islam in respect
of any of the matters included in para 1 thereof, as construed narrowly by my learned
brother in Lim Chan Seng, by the mere fact that the jurisdiction to decide on the matter
of the application of the plaintiff here is not so expressly stated in the Act. If I may call,
the wider jurisdiction given by para 1 of List II to the Ninth Schedule to the
I Constitution is the jurisdiction inherent in the Syariah court, subject of course to
the right to exercise that jurisdiction being expressly given by the Act which power
is within the competency of the legislature to do under art 74.

Harun Hashim SCJ in *Mohamed Habibullah's* case took the objective view of the
Constitution thus, at p 271:

Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic family law as evident from the Ninth Schedule to the Constitution ... Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Syariah courts but also by the civil courts. What art. 121(1A) has done is to grant exclusive jurisdiction to the Syariah courts in the administration of such Islamic laws. In other words, art 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the Syariah courts.

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Gunn Chit Tuan SCJ in *Mohamed Habibullah's* case, in response to the submission by learned counsel, said at p 285:

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With respect to the submission of Mr Balwant Singh Sidhu regarding whether the plaintiff could be considered an apostate, reference ought to be made to the dictum of Mohamed Yusoff SCJ (as he then was) in the recent decision of this court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1, when it was pointed out that in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the Syariah court.

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Citing *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1, Mohamed Azmi SCJ in *Mohamed Habibullah's* case had this to say at p 815:

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In *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam*, Mohamed Yusoff SCJ, has also expressed the following views:

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It is apparent from the observation made by the learned judicial commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious consideration and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate.

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The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.

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On this view, it is imperative that the determination of the question in issue requires substantial consideration on the Islamic Law by relevant jurist qualified to do so. The only forum qualified to do so is the Syariah court.

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Therefore, on the principle adumbrated in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1, I am more convinced of my view expressed earlier that this matter of the plaintiff which involves the

- A determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the Syariah court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the Syariah court would not make the jurisdiction exercisable by the civil court.
- B
- C Abdul Kadir Sulaiman J in our view, rightly took the wider *approach by preferring to follow Wan Adnan J (as he then was) in Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 1 MLJ 690 and later affirmed by the Federal Court ([1999] 1 MLJ 489) and did not follow *Lim Chan Seng*, in which the learned judge there took a narrow approach. We would respectfully add that the wider approach is in keeping with the purposive approach which has been given legislative recognition by s 17A of the Interpretation Act 1984 and 1967 and reads:
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- E In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
- In the circumstances, we would respectfully say that we cannot support the narrow approach taken by Harun Hashim SCJ in *Mohamed Habibullah* at p 800:
- F I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is firstly to see whether the Syariah court has jurisdiction and *not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah court.* (Emphasis added.)
- G The question that may flow from the judgment of Abdul Kadir Sulaiman J, which we agree, would be what happens when a party may not have his remedy expressly stated in the state law pertaining to Muslim?. The answer, in our view, is not for the courts to legislate and confer jurisdiction to the civil courts but for the state legislature to provide the remedy. *The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures* (see *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and Other Applications* [2003] 1 MLJ 265; *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345). We need therefore to give effect to the purpose or object of the amendment to art 121 of the Constitution. As correctly stated by Abdul Kadir Sulaiman, J for which we agree, we requite what his Lordship said: *The fact that the plaintiff may not have his remedy in the Syariah court would not make the jurisdiction exercisable by the civil court.*
- I (Emphasis added.)

[29] The subject lands have already been included in the claims before the Syariah court and the Syariah action was instituted in accordance with legislation pertaining to the personal law of persons professing the religion of Islam and both parties in the present appeal are persons professing the religion of Islam and hence on the basis of wider judicial approach it would appear that a civil court should be entirely precluded from further taking cognisance of the appellant's claims to prevent duplicity.

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[30] The appellant's claim in the civil court is founded on what has been termed as a derivative action with assertions of a beneficial trust. If the wider approach that has been judicially propounded in the line of decisions of the Federal Court as mentioned above, is also to be applied in this appeal this would entail a perusal of List II (or the State List) of the Ninth Schedule to the Federal Constitution. The subject matters appearing therein are subject matters in respect of which the *Federal Legislature is competent to legislate upon in respect of the Federal Territories in matters of the religion of Islam*. In effect the wider approach if adopted would mean that if there is a subject matter in the aforementioned State List which the Federal Legislature is competent and capable of legislating upon, by inference a civil court should not therefore assume jurisdiction even if the matter has yet to be legislated upon. If this is indeed the corollary of the wider approach examined above this court should then be incompetent to entertain the injunctive relief sought for.

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[31] If Item 1 of the State List of the Ninth Schedule to the Federal Constitution is further perused it also includes, the subject matter 'trusts'. Furthermore in the item 4(e) of List I (or the Federal List) of the Ninth Schedule to the Federal Constitution paragraph (ii) has excluded the subject matters that are prescribed in paragraph (i) in so far as it may pertain to Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate or intestate. It would thus be for example that matters relating to trusts are matters in respect of which there could be legislation according to Syariah precepts and capable of coming within the scope of the jurisdiction of the Syariah court.

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[32] Another example, is that if the matter of 'negotiable instruments' is being considered in the matter of Islamic personal law relating to marriage, the normal interpretation to be given is that the civil court would have to be circumspect in not assuming jurisdiction should there be disputes involving parties who profess the religion. It is equally to be noted that the subject matters of equity and trust have also been stipulated in para 4(e)(i). The Syariah court is therefore also capable of being vested with jurisdiction in such matters.

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A [33] On the other hand, List I of the Ninth Schedule or the Federal List to the Federal Constitution includes, inter alia, item 8(c) and one of the subject matters specified therein is the subject matter 'incorporation'. In contrast too it is to be further observed that item 8(c) is not qualified by another paragraph in the manner that paragraph (ii) qualifies paragraph (i) in item B 4(e) in the Federal List. Hence the law relating to companies remains within the *corpus juris* of secular law.

C [34] The expression 'harta sepencarian' in s 2 of the Act 1984 refers to property jointly acquired by husband and wife. The subject matters of the appellant's claim in the Syariah court is simply land which are alleged to constitute part of the property jointly acquired. Learned counsel for the appellant has also contended that the Syariah court is capable of conducting an inquiry presumably to consider how the subject land was acquired and D other related questions.

E [35] The question therefore ensues whether in essence there is here indeed a conflict jurisdiction between the Syariah court and a civil court bearing in mind that *Dalip Kaur's* case,, has also observed that art 121(1A) does not take away the jurisdiction of the civil courts to interpret any written law of the states enacted for the administration of persons who profess the religion of Islam. There is no suggestion here that there is already in place specific legislation on 'equity and trust' in the Islamic personal law although there is F no doubt that there are precepts that could be applicable. At this stage it is not known what aspects of Syariah law would be invoked to determine the apportionment of the harta sepencarian.

G [36] If art 121(1A) of the FC has been included with the object of overcoming conflict then civil courts should have the role of assisting in avoiding the conflict. With that in mind it is found pertinent to state that the possession of the harta sepencarian is the final outcome whilst the sources of the harta sepencarian may still be attributed to different or varied sources.

H [37] Bearing that in mind in this case the appellant is alleging that the original source of acquiring the subject land were transactions conducted by a company, that is, Rasa Rata the outcome of which the subject lands were transferred to the appellant. At this stage this court is to refrain from dwelling in full on the merits but the circumstances surrounding the transfer of the I land and the alleged trust establish the fact there are indeed serious issues to be tried at the trial of the appellant's main claim in the High Court.

[38] Consequently even if the subject lands which have since changed form into compensation monies, may have been claimed in the first instance as

harta sepencarian, this is not in essence a matter of conflicting jurisdiction but one of a possible overlapping claim for the reasons given hereafter.

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[39] The alleged position of the first respondent arose out of the activities of two companies where the first respondent is a common director in both companies. Learned counsel for the appellant has submitted that her action has been based on the following documents:

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(i) A sale and purchase agreement dated 10 December 1981 between the first respondent and the second respondent whereby the said lands were sold to the second respondent for RM4.2m to be satisfied by the issuance and allotment of RM2.9 million shares in the second respondent.

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(ii) A resolution dated 30 November 1981 of the second respondent authorizing the issuance of the 2.9 million shares to the first respondent.

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(iii) An express trust deed dated 21 January 1986 under which the first respondent declared, among other things, that he held the said lands in trust for the second respondent as beneficiary. The first respondent had received compensation monies as stated above and utilized it for himself.

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[40] The appellant in instituting the derivative action is seeking to enforce a right of the Rasa Rata Company where the company itself has to be made a co-defendant. It has been submitted that the trial judge while admitting that there are triable issues to be tried had summarily dismissed the matter simply on the ground that the Syariah court was already seised of the matter.

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[41] The matters mentioned in encl 4, that is the originating summons in which the application for injunction has been filed are not confined to matters relating to trusts but also the law relating to companies.

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[42] The question here is whether this is to be considered as not essentially a matter of conflicting jurisdiction but one which constitutes an overlapping jurisdiction. It is noted that up to this point of time the inception of Syariah precepts into the *corpus juris* of Malaysia is primarily evolutionary in character. There does not seem here to be an outright conflict of jurisdiction. Courts being vested with the responsibility of interpretation would invariably and in more forthcoming instances be involved with the process of fincombing the issues. In this instance it is also noted that the source of jurisdiction of the civil court to grant injunction is found in sub-s 25(2) of the Courts of Judicature Act 1964 read with para 6 of the Schedule to the Act. The relevant part states:

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A Power to provide for the interim preservation of property the subject-matter of any cause or matter by injunction

B [43] The jurisdiction of the Syariah court is founded in a legislation which was promulgated later that is after the inception of the Courts of Judicature Act 1964. This would attract the principle of interpretation *lex posterior derogant priori* that is whether the later provisions in the Syariah legislation (which is applicable only to persons whose personal law is Islam) derogates from the prior that is the Courts of Judicature Act 1964. This principle of statutory interpretation has been discussed in the case of *Harshad S Mehta & Ors v State of Maharashtra* 2001 8 SCC 257. Although that case pertains to the powers of a special court and whether it has powers to grant pardon by implication whilst those powers are actually found in a general law the discussion relating to the repeal of a legislation by implication found therein is useful. The relevant passages are:

D Mr Jethmalani also sought to invoke the doctrine of implied repeal. Pointing out that the Code is a general law and the Act — a special later enactment, Section 13 whereof shows its predominance and superiority, this Court should not have any reluctance to accept the applicability of doctrine of implied repeal in these matters, was the submission of learned counsel though he, very fairly and rightly, conceded that there is a presumption against a repeal by implication.

E The reason for the presumption as aforesaid is that the legislature while enacting a law has a complete knowledge of the existing laws on the subject-matter and, therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. The burden to show that there has been a repeal by implication lies on the party asserting it. Relying upon *Statutory Interpretation* by Francis Bennion (1984 Ed), counsel contends that where, as in the present case, the provisions of the later enactment (the Act) are contrary to those of the earlier (the Code), the later by implication repeals the earlier in accordance with the maxim *leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary laws). This is, however, subject to the exception embodied in the maxim *generalalia specialibus non derogant* (a general provision does not derogate from a special one).

F One of the important tests to determine the issue of implied repeal would be whether the provisions of the Act are irreconcilably inconsistent with those of the Code that the two cannot stand together or the intention of the legislature was only to supplement the provisions of the Code. This intention is to be ascertained from the provisions of the Act. Courts lean against implied repeal. If by any fair interpretation both the statutes can stand together, there will be no implied repeal. If possible, implied repeal shall be avoided. It is, however, correct that the presumption against the intent to repeal by implication is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing laws. Repugnancy must be such that the two statutes cannot be reconciled on reasonable construction or hypothesis. They ought to be clearly and manifestly irreconcilable. It is possible, as contended by Mr Jethmalani, that the inconsistency may operate on a part of a

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statute. Learned Counsel submits that in the present case the presumption against implied repeal stands rebutted as the provisions of the Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. The contention is that the provisions of Section 306 and 307 cannot be complied with by the addressStreetSpecial Court and thus the legislature while enacting the Act clearly intended that the said existing provisions of the Code would not apply to the proceedings under the Act. Learned Counsel contends that this Court will not construe the Act in a manner which will make Section 306 and 307 or at least part of the said sections otiose and thereby defeat the legislative intendment whatever be the consequences of such an interpretation.

The contention further is that the deficiency in the Act, if any, cannot be provided by the court particularly when the language is plain and simple and the assumed gaps cannot be filled by the court and that the willful omission made by the legislature has to be respected by the court. On the legislature willfully omitting to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission under the guise of interpretation by analogy or implication, something what it thinks to be a general principle of justice and equity, reliance has been placed upon *CST v Parson Tools and Plants*, *Lord Howard De Walden v IRC*, *Johnson v Moreton and Harcharan Singh v Shivrani*. The contention is that any interpretation by this Court other than the one propounded would be entrenching upon the power of the legislature. On the principles of interpretation, on detailed consideration of various decisions of this Court and courts of other countries, in *SP Gupta v Union of India* a Bench of seven Judges said:

But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words pr the language used in a statute are clear and cloudless, plain, simple and explicit, unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom.

[44] In addition the abovementioned decision also made a ruling which has been referred to in *NS Bindra's Interpretation of Statutes* (9th Ed) at p 356 as follows:

The rule of harmonious construction is applicable not only to the conflicting provisions of the same statute but also in cases where the provisions of different statutes are in conflict.

[45] At p 288 the court had ruled as follows:

The provisions of the Act and the Code can stand together. There is no inconsistency. The two statutory provinces can harmoniously operate without causing any confusion or resulting in absurd consequences.

A [46] It is found that in this appeal the court here is not concerned with conflicting provisions in the same legislation but a question of interpretation on the question of jurisdiction. It is thought also apt here to harmonise the interpretation to be given to the jurisdiction of the Syariah and civil courts. The ascertainment of the precise status of the subject lands before they
B changed form into a monetary compensation is the issue before the civil court. The determination of the question relating to the transactions alleged to be undertaken by two companies namely Sri Alam and Rasa Rata is capable of assisting rather than negating the jurisdiction of the Syariah court for purposes of apportioning the harta sepencarian. It is not seen here how
C the efficacy of the jurisdiction of the Syariah court would be impaired or prejudiced by a civil court determining whether there were indeed transactions undertaken by a company in respect of which both the appellants and respondents are directors. In any event this is not strictly a
D matter concerning the practise of faith in Islam but one of matters relating to the activities of companies where the persons involved are professing the religion of Islam. The core of the appellant's claim remain within the sphere of secular law. The first two objections to jurisdiction are therefore not upheld. It is found that this court is able to exercise its jurisdiction without violating the object of art 121(1A) of the FC.

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[47] Having dealt with the two objections as stated above the third objection raised by learned counsel of the respondent in opposition of the application for an injunction dwells on the issue of an alleged misleading conduct. It is averred that the appellant had failed to disclose to the High
F Court that an action had been commenced by her in the Syariah court for a half share of the subject lands as harta sepencarian. This, it was averred, was in contradiction of her averment in the application for injunction that the subject lands belong instead to the second defendant (now second
G respondent). In the Syariah action the appellant had given sworn evidence that the subject lands are registered in the name of the first respondent and hence the averments made by her in her affidavit are alleged to be misleading.

H [48] This contention has been met by the response that in one of the affidavits in support of the application for injunction the appellant had affirmed that it was only in recent times that the appellant had discovered a trust deed indicating for the first time that the purchase price for the subject lands had in fact been paid by the second defendant/ respondent and hence it was beneficially entitled to the said subject lands.

I [49] In addition the appellant contended that the trust deed which was averred to be executed on 21 January 1986 by the first respondent declared, inter alia, that he held the said lands in trust for the second defendant as beneficiary. What is alleged here by the appellant is that there is also the

willful suppression of the existence of the trust deed by the first respondent. The explanation provided by the appellant is found to be plausible in considering whether her actions are indeed intended to be deliberately misleading or otherwise. Having dealt with this point it is still necessary in line with the decision in *American Cyanamid Company v Ethicon Limited* [1975] AC 396 to consider: (i) whether damages should be the more adequate remedy; and (ii) whether the balance of convenience lies in favour of granting the injunction. May LJ explained in *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 at p 237H:

That (the balance of convenience) is the phrase which, of course is always used in this type of application. It is, if I may say so a useful shorthand but in truth ... the balance that one is seeking to make is more fundamental, more weighty than mere 'convenience'. I think that it is quite clear ... that although, the phrase may well be substantially less elegant, the balance of the risk of doing injustice better describes the process involved.

[50] In the present appeal the appellant is seeking to maintain a status quo, that is the compensation monies standing in the account of the first respondent hazards a risk of being used up, transferred or even dissipated. It is also contended that this not strictly a question of seeking damages but a restitution of the assets that are alleged to be rightly standing to the credit of the second respondent instead. On this ground it was contended that the question whether damages would be a more adequate remedy was irrelevant. This point has not been seriously contested.

[51] The risk of doing the injustice in the circumstances of the case would operate against the appellant as the compensation from the acquisition of the subject lands have already been transferred to the first respondent and it is further contended that more compensation would be expected.

[52] However the court has also to consider whether the injunction if granted should be so granted in terms which are as wide as prayed for. It is to be recalled that while both the appellant and first respondent are directors of Rasa Rata, the appellant is the minority shareholder of the second respondent company in which she is the registered and beneficial owner of 512,000 ordinary shares of RM1 per share equivalent to 7.97% in the capital of the second respondent company.

[53] Hence if the first respondent is to be ordered to be enjoined from utilizing or transferring or withdrawing the sums received by him which amounts are totalling RM119,536,026 as compensation for the acquisition of the subject land, and the concern here is that it would be too wide in its terms as the first respondent as a director and majority shareholder of the second

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A respondent company and being the registered and beneficial owner of 5,909,039 ordinary shares of RM1 per share it is equivalent to 92.03% in the capital of the second respondent.

B [54] In the final analysis this court is minded to allow the appeal by setting aside the order of the learned High Court judge in refusing the application for injunction.

C [55] In consequence an order for an injunction is also granted in that the first respondent is to be restrained from utilizing or withdrawing the sums received by the first respondent up to an amount equivalent to 7.97% of the total of RM119,536,026 which is being kept with AM Finance Bhd. at its headquarters in Kuala Lumpur or any other financial institution inclusive of accrued interest thereon and to be further restrained from using any payments of compensation from the relevant authorities in respect of the aforesaid lands for any other purposes than for the benefit of the second respondent. Order in terms is also granted in respect of paras 2 and 3 of encl 4. Costs is to follow the event. The deposit is to be refunded to the appellant.

E [56] My learned brothers Zulkefli JCA (now FCJ) and Raus Sharif JCA have read the draft copy of this judgment and agreed with it.

Appeal allowed.

F Reported by Andrew Christopher Simon

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